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## Reptile Theory in Employment Cases

### I. Development of the Reptile Theory

David Ball and Don Keenan wrote a book, *Reptile: The 2009 Manual of the Plaintiffs Revolution* (1st ed. 2009) (“Reptile”), which outlines a theory underlying a particular trial strategy that is becoming more popular amongst the plaintiff’s bar. The Reptile theory is based upon purported scientific studies of the human “Reptilian brain.” *Id.* at 17-19. According to the authors, the Reptile’s primary function in the human brain is to keep its genes alive and spread them to future generations. This impulse, they maintain, drives all life and represents an imperative that will win out over all other considerations, including the force of logic. While people like to believe that logic controls our lives, in actuality the Reptile rules, at least when confronted with potential danger. According to the authors, when survival is not at stake, the Reptile stays at rest, or in “fritter mode,” until fear sets in. Thus, in trial, the plaintiff’s goal is to get the juror’s brain out of “fritter mode” and into “survival mode.” Attorneys can do so by framing aspects of the case in terms of Reptilian survival. *Id.* at 18. This is called “awakening the reptile.” Jurors are encouraged to see survival danger, in which event “she protects her genes by impelling the juror to protect himself and the community.” *Id.* at 19.

*Reptile* teaches that the primary goal in trial is to show the immediate danger caused by the defendant’s conduct and that fair compensation to the plaintiff can diminish that danger within the community. *Id.* at 30. The authors emphasize the importance of extending the juror’s fears to the community as a whole—“that the tentacles of danger extend throughout the community.” *Id.* at 35. In describing a successful trial strategy in one case, they point to how one lawyer demonstrated “that this case was not about a unique event or an accident, and that it was not just about his client. He showed that it was a ready and waiting menace to everyone in the community...” *Id.* at 37.

*Reptile* touts that it “gives jurors [a] personal reason to want to see causation and dollar amount come out justly, because a defense verdict will further imperil them. Only a verdict your way can make them safer.” *Id.* at 39.

There are a good many reasons to prohibit *Reptile* trial tactics in the courtroom. To begin with, *Reptile* tactics mislead juries into believing that the legal standard of care is the safest possible action. The *Reptile* tenet that the greater the danger, the higher the standard of care, is contrary to law. Furthermore, *Reptile* tactics are intended to cause jurors to ignore the Court's instructions not to let sympathy or bias play any role in their decisions. And, by couching the facts in terms of dangers to the community, amongst whom all jurors are members, it asks jurors to place themselves in the shoes of the Plaintiff and protect the community by "sending a message" to those who threaten the community.

## II. Problems with Reptile Theory Generally

Reptile Theory is akin to a "Golden Rule" or "Conscience of the Community" argument. The classic prohibited "Golden Rule" argument is one where counsel asks the jury to place themselves in the victim's shoes. See *Fields v. Woodford*, 309 F.3d 1095, 1109 (9th Cir.2002); *Granfield v. CSX Transp., Inc.*, 597 F.3d 474, 491 (1st Cir. 2010); *Blevins v. Cessna Aircraft Co.*, 728 F.2d 1576, 1580 (10th Cir. 1984); *Hovis v. City of Burns*, 243 Or 607, 613 (1966) (improper to ask jury to put themselves in plaintiffs position). Such arguments are improper because they undermine the jury's impartiality. Jurors are instead urged to reach a decision based on self-interest, rather than on the facts in the case.

While plaintiffs' lawyers at trial may not specifically ask the jury to put themselves in the Plaintiff's shoes, the subtle *Reptile* tactic of referring to personal and community safety is intended to achieve that result. Presenting arguments regarding "personal safety" or "community safety" are intended to cause fear. In turn, these statements subtly place the juror in the plaintiffs' shoes in direct violation of the ban on "Golden Rule" arguments. It manipulates jurors into equating compensating plaintiffs with diminishing the danger to themselves and their loved ones. This is precisely why "Golden Rule" arguments are prohibited. Indeed, plaintiffs appeal to jurors' sense of sympathy and safety because such arguments encourage jurors to decide the case on reasons other than evidence, and the law contained in the Court's instructions.

Similarly, Reptile Theory is a run around prohibitions against "send a message" and "conscience of the community" argument, which are inherently prejudicial because they too urge the jury to render a verdict based on "passion and prejudice." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 426 (1994). These arguments "distract the jury from its 'sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial.'" *Whitehead v. Food Max*, 163 F.3d 265, 277 (5th Cir. 1988) (quoting *Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1238-39 (5th Cir. 1985)); *Griffith v. Mt. Carmel Med. Ctr.*, 842 F. Supp. 1359, 1362 (D. Kan. 1994) (stating plaintiffs' counsel made comments referring to their own personal indignation, asking the jurors to "send a message," and suggesting that the jurors put themselves in plaintiffs' position were "inappropriate"); see also, *Hoffman v. Brandt*, 65 Cal. 2d 549, 552-53 T(1966) (reversing "a deliberate attempt by counsel to appeal to social or economic

prejudices of the jury”); *Malkasian v. Irwin*, 61 Cal. 2d 738, 847-47 (Cal. Ct. App. 1964); cf. *United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992) (prosecutor’s inflammatory remark that jury should be a “bulwark” against drugs improperly incited jurors to be the “conscience of the community”); *United States v. Solivan*, 937 F.2d 1146, 116-53 (6th Cir. 1991) (reversing conviction based on prosecutor’s closing argument urging jurors to “send a message;” finding such appeals “extremely prejudicial and harmful”); *Pierce v. Platte-Clay Elect. Coop.*, 769 S.W.2d 769, 779 (Mo. 1989) (such “send a message” arguments are inappropriate); *New York Central R.R. Co. v. Johnson*, 279 U.S. 310, 319 (1929) (references to defendant as “eastern railroad” that had “come into this town” and witnesses “sent on from New York” “have so often been condemned as an appeal to local or sectional prejudice as to require no comment”).

### **III. Reptile Theory in Employment Cases**

Though Reptile Theory was developed with personal-injury cases in mind, its use has recently extended outside of that context into areas such as insurance and employment law. In employment law, themes such as the following are argued at trial.

- Having a work environment completely free of discriminatory comments, jokes, bias, and harassment, however minor, is the only way to protect employees.
- Employees are at the mercy of their employers.
- Employees have no control over their working environments.
- Employers, i.e., “big business,” have all the control.
- Employers should always act to address every discriminatory, biased, or harassing comment in the workplace, no matter how small.
- Employers have an ethical duty to look out for their employees.
- Employers should not make huge profits at their employees’ expense.
- Employers make it too difficult to report harassment or discrimination.
- Employees should not have a fear of retaliation when they make complaints.
- Employers should never penalize employees who make complaints.
- Employers should never attempt to protect a supervisor about whom a complaint is made.
- Employers look for ways to fire or otherwise penalize complaining employees.

- Employees are in the best position to know what happened.
- Employees should get the benefit of the doubt when there is a question about something.

Plaintiffs' lawyers begin developing these themes as early as initial written discovery, and effectively responding to the lawyer's questioning at depositions is key. Witnesses should be trained to resist "yes or no" answers in the context of questions that will lead them down a hole and into in a box.

Developing effective counter-themes is also essential. Examples include:

- Employer X does a lot of good for the general public.
- It hurts the community (and honest people) when people make false claims of discrimination, bias, and harassment.
- The costs of doing business, and in turn the costs of goods and services, go up when people make phony complaints.
- Employers must not settle phony complaints, because innocent other employees (those accused) can get hurt.
- Unfortunately, there are dishonest employees who try to take advantage of their employers at the expense of everyone else.
- The general public will suffer if employers pay or overpay on complaints made to them.
- It is important for employers to investigate each complaint to determine if it is valid, and to not act if there is no evidence to support a complaint.
- Employers are not meant to be a guaranteed slot machine or free ATM machine and give out cash to anyone who makes a complaint.
- Employees have an obligation to read the Employee Handbook and ask questions if anything is confusing.
- It is wrong for employers to look for loopholes or act unethically, and the same is true for employees.
- Employers and employees should be held to the same standards of ethics and honest conduct.
- Employees must make complaints in a timely manner, as soon as they are aware of a problem.

- Employers don't want to not act on valid complaints, but if they make a mistake they will work with the employee to fix it.
- Employers are made up of honest people who want the business to succeed and want their employees to be happy and productive.
- Lawsuits are supposed to be about fixing discriminatory, biased, or harassing situations. Lawsuits are not necessarily about firing the offending party when training and an apology are all that is needed to fix the situation.

This presentation will train defense counsel on the use of these counter-themes throughout the development of their defense of this case, and into trial, so as to avoid adverse verdicts obtained through plaintiffs' counsel's use of Reptile Theory against them.